EMPLOYMENT TRIBUNALS

Claimant:	**Haleem Fazal**
Respondents	**(1) The Secretary of State for Business, Energy & Industrial Strategy** **(2) FH7 Limited – in Liquidation**
Heard at:	**Bristol Employment Tribunal via VHS**
On:	**21st December 2022**
Before:	**Employment Judge Lang**
Representation	
Claimant:	**Mr. Kenward (Counsel)**
Respondents:	**Mr. Soni, (Tribunal Representative) for the Secretary of State** **No attendance from FH7 Limited.**

JUDGMENT

1) The conclusion of the Tribunal is that the Claimant was an employee of the Second Respondent.

2) The Claimant is entitled to recover the statutory redundancy payment from the Secretary of State for Business, Energy & Industrial Strategy, given FH7 Limited is in Liquidation, in the sum of **£1,603.80**.

3) The Claimant's claim for payments for debts from the Secretary of State for Business, Energy & Industrial Strategy, for outstanding holiday, arrears of pay and notice are out of time and therefore the tribunal does not have jurisdiction in respect of them.

4) If the Claimant seeks to make any representations in respect of the question of time, in respect of paragraph 3 above, he must do so by 11th January 2023.

5) The Secretary of State for Business, Energy & Industrial Strategy, may if so advised, respond to any representations made by the Claimant within 14 days of any representations from the Claimant being received.

REASONS

1. This is a claim brought by Mr Haleem Fazal, the Claimant, by way of an ET1 received on 11th February 2022. The Claim is brought against the First Respondent, the Secretary of State for Business, Energy and Industrial Strategy (hereafter "the Secretary of State"). The Second Respondent is FH7 Ltd which is in liquidation. It is that company that the Claimant alleges employed him.

2. The Claimant has been represented by Mr Kenward of Counsel. The Secretary of State has been represented by a Tribunal Representative, Mr Soni. The Second Respondent has not attended. The ET1 and Grounds of Complaint were served on the administrators who have played no part. In the circumstances where no Judgment is sought against the Second Respondent it is considered by all that I can proceed in their absence.

3. The hearing took place before me on the 21st December 2022 via VHS. There were some technical difficulties which slowed the progress of the hearing and resulted in oral reasons being given outside of the normal sitting hours. I was grateful to the Claimant and both Representatives for making themselves available throughout. Overall, despite those technical difficulties the hearing was effective and both parties have been heard and their cases have been put in a fair manner.

4. I had the benefit of both written and oral evidence from the Claimant, who was challenged robustly, but fairly, by Mr Soni on behalf of the Secretary of State. I have also had a bundle in two parts, which runs to 186 pages, an authorities bundle and a skeleton argument from Mr Kenward on behalf of the Claimant.

5. At the conclusion of the hearing these written reasons were requested orally by the Secretary of State.

Issues

6. I must firstly determine whether the Claimant was an employee of the Second Respondent such to give rise to the First Respondent having to make a payment pursuant to sections 166 and 168 of the Employment Rights Act 1996.

7. If I conclude the Claimant was an employee I need to consider:
    a. What is the amount of the redundancy payment?
    b. Were there arrears of pay and if so what amount?
    c. Was any holiday pay accrued but untaken, and if so, what amount is recoverable?
    d. Is any there notice period payment is recoverable and if so in what amount?

8. There is also an issue with regards to time and whether the second to fourth elements of the claim, namely the claims for payments for outstanding arrears of pay, holiday pay and notice pay are in time. That

issue was only identified by me at the end of the Claimant's submissions. Whilst it is correct that the Respondent did not raise the same in the ET3 it is a matter which goes to whether I have jurisdiction to make the award sought. It was agreed between the parties that I would afford them both the opportunity, if so advised, to address me on the issue further in writing. The Claimant was not in a position to do so on the hearing date due to the Claimant's solicitor having been away and the time in which the issue was identified.

Findings of Fact

9. I turn to the findings of fact which I make having heard and considered the evidence.

10. The Company FH7 Limited was incorporated on the 13th April 2018. The Claimant and his wife were appointed Directions and were equal shareholders with holdings of 50% each. I accept the evidence of the Claimant that the company was set up with the assistance and guidance of the accountants. The position of the Claimant is that at the same time the company was set up both he and his wife became employees. I will return to that contention later in these findings. There was however, it is accepted, no written contract of employment. Nor was a contract issued to his wife who was a former employee. It is accepted the company went into voluntary liquidation on 27th July 2021.

11. The purpose of the company was to provide telecommunications and consultancy services to various clients. The company itself was VAT registered and whilst the Claimant was challenged in respect of that registration in cross examination, and it is not clear whether or not the income ever met the threshold for compulsory VAT registration, there is nothing which prevents registration for companies turning over less than the threshold.

12. The company would contract with clients to provide services. I have been provided with some examples of those contracts. The first is dated 27th April 2018 and relates to a company known as Ember Search [143-144], there is a second contract provided with a client called TPC [145-152]. Those contracts were between the Second Respondent and the respective clients, and named the Claimant as the consultant who undertook the work was undertaken, the Claimant stated, in the capacity of an employee. The Second Respondent would then invoice the clients for the work undertaken and again I have the benefit of some of the invoices [153-158], and the time sheets [159-161] provided to the clients in support of the invoice and which shows the work which was undertaken on their behalf.

13. When I consider the invoices provided I can see firstly there is one from 9th November 2018 for Mottram Search Limited in the sum of £6,300 inclusive of VAT. The same company was again invoiced on 30th November 2018 for £3,150 inclusive of VAT. A further example is provided with TPC dated 30th April 2019 for £13,200 again inclusive of VAT. Notwithstanding the sums that were paid from the client to the Second Respondent, the position and case put forward by the Claimant is that he received a steady salary which I will return to in a moment. What he told me in evidence is

that money that would come in was company money which would meet other liabilities and be invested in the business. He would be paid a salary on a monthly basis. I accept that evidence and find that is true and accurate.

14. Two spreadsheets have been provided by the Claimant which he tells me shows the sums paid to him by the company. The first covers the period of 29th April 2019 to the 31st March 2020 (inclusive), the runs from the period of 29th September 2020 through to the 25th February 2021. For the period for 28th March 2021 and 28th April 2021 there is said to be sums which are owing. Those spreadsheets show consistent monetary payments of £1041.66 gross, £1,002.00 net. However, I accept there are periods of time including in December 2020 through to March 2021 where there were lower payments made. The Claimant asserts that those stable sums were a salary paid to him as he was employed. There was an agreement that he would work for 40 hours per week, and that was the salary he received in turn. It was a fixed sum. Whilst I accept there are some inconsistent payments I accept the evidence of the Claimant as supported by those spreadsheets that it was a salary he was being paid. I accept the evidence of the Claimant which was consistent and credible, and I find there was a fixed salary which the Claimant would receive, despite there being periods where payments would not be made, and it would fluctuate to make up shortfalls.

15. It is pointed out, fairly, by the Secretary of State that the sums paid for the 40 hours per week fall below the national minimum wage. It would give a wage of approximately just £7.80 per hour when the national minimum wage was in excess of £8.00. I find, as is accepted that the Claimant was paid below the national minimum wage.

16. In relation to those regular payments my finding is further supported by the bank account statements provided, as well as the payslips. Whilst any tax payment has clearly been negligible, it is not challenged, and I find, that the payments have been made using the PAYE scheme. Furthermore, I have been provided two P60s for April 2020 and April 2021 together with the HMRC print outs which both show the tax and income received by the Claimant from his employment. Again, it is not challenged that the Claimant paid, and the second respondent paid National Insurance in accordance with the employee/ employer scheme. There is no evidence that when the larger sums were paid into the business by the various clients that the Claimant treated that money as his own, or treated it as an enhancement of his salary.

17. In addition, I find that the Claimant was signed up to an employee pension that benefited from employer and employee contributions and to that end have a St James' Place statement of contributions for the years 2019-2020.

18. In turning to the hours worked I accept the evidence of the Claimant which was in my Judgment clear and consistent that whilst he had no fixed times for him to complete his hours, that is to say he would work 8am – 5pm Monday to Friday, he did have a set number of hours which he would work. The reason he had no fixed period when he would work, I accept

was because it would differ depending on the needs of a client, and that may involve a need to work earlier or later depending on the needs of the client. However, I accept, and there is no evidence to the contrary, that the Claimant would work a fixed 40 hours per week despite the flexibility as to when those hours would be worked.

19. I further accept the evidence of the Claimant that the reason he was paid under the national minimum wage, was twofold. Firstly, because he had followed the advice of his account on how much he should be paid and secondly because he was putting in hours to build the business. I do not find that there is a conflict in that position and him being an employee, however, I accept the fact it falls below the national minimum wage is a factor which points away from him being an employee and I will return to that in due course.

20. The Claimant gave evidence in respect of holiday. I agree that he was to some extent vague in respect of his holiday entitlement, and he confirmed in his evidence it was only during conversations with those who have represented him as part of these proceedings he was aware of a minimum requirement of holiday. I accept that was the first time he gave any real thought to it. I accept the point raised by the Secretary of State that is a factor which may point to the fact that he is not an employee. I find in accordance with the Claimant's evidence the reason for that was because he was building the business and doing the work required for his wage which was his focus. While it is correct no records have been provided for holiday taken in these proceedings I am satisfied what the Claimant tells me, that he would take time off and how any time off would be agreed with the clients and them him as a director and then leave would be authorised. I accept that is how his holiday worked. It is argued that he has worked more than usually would be expected of an employee, however there is no prohibition in that. An individual may not take their leave, it does not follow that an employee who does not take their full entitlement means that they no longer are an employee, but I accept it is a further factor which must be considered.

21. The Claimant never took advantage of any sick pay however, I accept and find, and again there is no evidence to the contrary, that he would have been entitled to sick pay if he required it. He had holiday pay, although did not take advantage of the full entitlement.

22. There is no evidence that the Claimant was working, or employed elsewhere.

23. There is also no evidence to suggest that the Claimant could substitute himself as an employee for someone else. Whilst it may have been possible for another employee to undertake contracts (if they were employed) that was not the same as him being substituted as an employee.

24. It was significant in my Judgement that from the Claimant's evidence he had a very clear distinction in his role as an employee of undertaking the consulting work and the role of a director. He outlined the differences, including fiduciary duties he must comply with, management of money,

signing off accounts, ensuring a safe place of work. That he told me was different to what his employment was which involved going out and doing work for the company and its clients. It seems to me, and I find, he was clear in his mind in respect of the differences in roles he would perform. I also find from his evidence that he treated company money not as being his and his wife's but the business's. His evidence was that it was the money of the business, he stated *I could not take the money if I wanted* when he was challenged by the Secretary of State on the low amounts he paid himself compared to the income received to the company from the work done. The fact he does not take money as and when supports a finding that he is an employee treating self and that was at the inception of the company and up until the point of the insolvency.

25. For the reasons I will turn to in my conclusions I am satisfied on the balance of probabilities that the Claimant was an employee, and that he was controlled in his role as an employee by himself, and his wife, wearing their *hats*, as he put it, as directors. I am satisfied that his employment started on 13th April 2018 and terminated by reason of redundancy on 30th April 2021 providing him with 3 years full service. At the time of termination he was 48 years of age.

26. I have been provided with a schedule of loss together with spreadsheets that show the time periods where the Claimant has not received the sums which were due to him immediately and I find that there have been, and are, arrears of pay due to a failure to pay the minimum wage and in accordance with his calculation at 133 of the bundle. I find that on the basis of the spreadsheets and schedule provided which I am satisfied the Claimant is being honest about and provides the breakdown of the salary of what is owed and should have been paid.

27. I find and accept, and it was not challenged, that the statutory notice period was 3 weeks.

28. I accept the evidence of the Claimant that that he took 5 days holiday plus bank holidays in the previous holiday year. It is rightly identified by Mr Soni that there is a contradiction the position on holidays and the Claimant's replies to questionnaires which he submitted the Secretary of State where in both he said zero holiday was taken. I, however, accept the evidence of the Claimant, he addressed that inconsistency in a frank fashion, it was a mistake and he corrected it. He dealt with that in an appropriate manner in his evidence. I agree, on balance that the point made by both the Claimant and his Counsel is right, he is not an individual who was seeking to exaggerate his claim, or he would not have made that concession. If he were trying to exaggerate he would have sought to claim more holiday than is due. That factor in my judgment adds to his credibility and I consider him to be an honest and reliable witness.

29. The fact that there were no records provided does not change my finding on the holiday claim. I have his schedule of loss which he confirmed the truth of and has maintained the position as set out. I therefore find in terms of the claim for holiday that he had an annual entitlement of 28 days, with the leave year commencing on the 13th April. For the previous year I find

that he only took 5 days leave and bank holidays. That left 15 days which could be carried over.

30. The question is whether the Claimant was entitled to carry over the holiday which I will again turn to in my conclusions. However, I make a finding and I accept the evidence of the Claimant both orally and in his schedule that it was not reasonably practicable for him to take leave in the previous year, and that was because he was working hard to save business due to the difficulties which were caused by the coronavirus pandemic. In those circumstances I find that he did carry over 15 days from the previous year, he took no entitlement in the current leave year. I accept, and it was, unchallenged his accrued leave for the most recent year was 1.3 days, leaving accrued but unused holiday pay of 16.3 days.

31. The Claimant applied to the Secretary of State for payments from the National Insurance fund, the claim was rejected and communicated to the Claimant by way of letter dated 2nd November 2021. The ET1 was presented on 11th February 2022. The ACAS receipt was 13th December 2021 with the certificate dated 14th December 2021 via email.

Law

32. I have had regard to the authorities bundle, the law as summarised in the skeleton argument of the Claimant and in the Claimant's Reply. I have also considered the authorities and law referred to in the ET3.

33. There is no dispute in respect of the statutory framework. I have had regard to the Employment Rights Act 1996. Sections 166 enables an employee to bring an application against the Secretary of State for the payment of a redundancy payment when the employer is insolvent (subsection 1 b). Section 168 goes on to set out the amount of that payment.

34. Section 182 enables an employee to make a claim to the Secretary of State for a debt that is owed by an employer at the appropriate date, when the employer has become insolvent, that the employment has been terminated and that the employee was entitled to be paid the whole or any part of the debt. Section 184 goes on to set out the debts to which the Part applies, that includes pursuant to subsection 1:

    a) *any arrears of pay in respect of one or more (but not more than eight) weeks*
    b) *Any amount which the employer is liable to pay the employee for the period of notice required by section 86(1) or (2) or for any failure of the employer to give the period of notice required by section 86(1).*
    c) *Any holiday pay*
        i. *In respect of a period of periods of holiday not exceeding six weeks in all, and*
        ii. *To which the employee became entitled during the twelve months ending with the appropriate date.*

35. The appropriate date is set out at section 185 of the act, which is either the date of the insolvency or the date of the dismissal.

36. Section 188 goes on to enable an employee to make a complaint to an Employment Tribunal in relation to those debts. Subsection 2 goes on to state that:
An employment tribunal shall not consider a complaint under subsection (1) unless it is presented—

(a)before the end of the period of three months beginning with the date on which the decision of the Secretary of State on the application was communicated to the applicant, or

(b)within such further period as the tribunal considers reasonable in a case where it is not reasonably practicable for the complaint to be presented before the end of that period of three months.

37. Section 230 of the Employment Rights Act at subsection 1 defines an employee as:

an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

A contract of employment is defined at subsection 2:

"contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

Employer and Employment are defined at subsections 4 and 5 as follows:

"employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

"employment"—

(a)in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b)in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly.

38. Sections 210 through to 219 set out the definitions of a week's pay. With section 221 subsection 2 stating: *Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.*

39. Section 1 of the National Minimum Wage Act 1998 sets out the entitlement for an employee to be paid the national minimum wage.

40. Section 17 goes on to set out that the employee is entitled to additional renumeration in the event that they qualify for the national minimum wage and are not paid it. The section then sets out the calculation which applies.

41. I have been taken to the case of **Paggetti v Cobb [2002] IRLR 861 EAT** which addresses the question of whether the national minimum wage impacts the calculation of a week's pay in accordance with the Employment Right Act 1996. There the Employment Appeal Tribunal held that a week's pay must be calculated subject to the national minimum wage even where that was not the actual pay received.

Employment Status

42. The starting point as to whether an individual is an employee is the test set out by Mackenna J in **Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2 QB 97** where at 515 it was stated:

A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.

43. Additionally, I have been taken to, and considered, the Supreme Court decision in **Autoclenz Ltd v Belcher [2011] ICR 1157 SC**. The Secretary of State emphasises paragraph 31 of the Judgement where Smith LJ's Judgment in **Firthglow Ltd (t/a protectacoat) v Szilagyi [2009] EWCA Civ 98** is quoted as follows:

[W]here there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were.

44. In **Nethermere (St Neots) Ltd v Gardiner [1984] I.C.R 612** at 623 Stephenson LJ added *"there must, in my judgment be an incredible minimum of obligation on each side to create a contract of service."*

45. I have been referred to **Fleming v SOS [1997] IRLR 682** and **Eaton v Robert Eaton Ltd & SOS IRLR 83 [1988]** which both considered the position of a director and majority shareholder could also be an employee.

46. However, the current position is as outlined by the Employment Appeal Tribunal in **Clark v Clark Construction Initiatives Ltd [2008] ICR 635, EAT** where it was concluded that a claimant who was the company's controlling shareholder was not also an employee. At paragraph 98 of the Judgment a non exhaustive list for factors for consideration was set out. They were as follows:

> *(1) Where there is a contract ostensibly in place, the onus is on the party seeking to deny its effect to satisfy the court that it is not what it appears to be. This is particularly so where the individual has paid tax and national insurance as an employee; he has on the face of it*

earned the right to take advantage of the benefits which employees may derive from such payments.
*(2) The mere fact that the individual has a controlling shareholding does not of itself prevent a contract of employment arising. Nor does the fact that he in practice is able to exercise real or sole control over what the company does (**Lee**).*
*(3) Similarly, the fact that he is an entrepreneur, or has built the company up, or will profit from its success, will not be factors militating against a finding that there is a contract in place. Indeed, any controlling shareholder will inevitably benefit from the company's success, as will many employees with share option schemes (**Arascene**).*
(4) If the conduct of the parties is in accordance with the contract that would be a strong pointer towards the contract being valid and binding. For example, this would be so if the individual works the hours stipulated or does not take more than the stipulated holidays.
(5) Conversely, if the conduct of the parties is either inconsistent with the contract (in the sense described in para.96) or in certain key areas where one might expect it to be governed by the contract is in fact not so governed, that would be a factor, and potentially a very important one, militating against a finding that the controlling shareholder is in reality an employee.
*(6) In that context, the assertion that there is a genuine contract will be undermined if the terms have not been identified or reduced into writing (**Fleming**). This will be powerful evidence that the contract was not really intended to regulate the relationship in any way.*
*(7) The fact that the individual takes loans from the company or guarantees its debts could exceptionally have some relevance in analysing the true nature of the relationship, but in most cases such factors are unlikely to carry any weight. There is nothing intrinsically inconsistent in a person who is an employee doing these things. Indeed, in many small companies it will be necessary for the controlling shareholder personally to have to give bank guarantees precisely because the company assets are small and no funding will be forthcoming without them. It would wholly undermine the **Lee** approach if this were to be sufficient to deny the controlling shareholder the right to enter into a contract of employment.*
*(8) Although the courts have said that the fact of there being a controlling shareholding is always relevant and may be decisive, that does not mean that the fact alone will ever justify a Tribunal in finding that there was no contract in place. That would be to apply the **Buchan** test which has been decisively rejected. The fact that there is a controlling shareholding is what may raise doubts as to whether that individual is truly an employee, but of itself that fact alone does not resolve those doubts one way or another.*

47. Those factors were subsequently considered by the Court of Appeal in **Secretary of State for Business, Enterprise and Regulatory Reform v. Richard Neufeld [2009] EWCA Civ 280**. At paragraph 88 of the Judgment the Court of appeal agreed with the essence of the factors referred to by Elias J in paragraph 98 of his Judgment although added comment to four of them. The relevant paragraphs are as follows:

88. *We respectfully agree with the essence of the factors referred to by Elias J in paragraph 98 of his judgment although we add a comment on four of them. Mr. Tolley criticised his first factor as amounting to a suggestion that the mere production of a written contract purporting to be a contract of employment will shift to the opposing party the burden of proving that it was not a genuine such contract. We doubt if Elias J was intending to refer to a legal burden. In cases where the putative employee is asserting the existence of an employment contract, it will be for him to prove it; and, as we have indicated, the mere production of what purports to be a written service agreement may by itself be insufficient to prove the case sought to be made. If the putative employee's assertion is challenged the court or tribunal will need to be satisfied that the document is a true reflection of the claimed employment relationship, for which purpose it will be relevant to know what the parties have done under it. The putative employee may, therefore, have to do rather more than simply produce the contract itself, or else a board minute or memorandum purporting to record his employment.*

89. *We consider that Elias J's sixth factor may perhaps have put a little too high the potentially negative effect of the terms of the contract not having been reduced into writing. This will obviously be an important consideration but if the parties' conduct under the claimed contract points convincingly to the conclusion that there was a true contract of employment, we would not wish tribunals to seize too readily on the absence of a written agreement as justifying the rejection of the claim. In both cases under appeal there was no written service agreement, but the employment judges appear to have had no doubt that the parties' conduct proved a genuine employment relationship.*

90. *As for Elias J's seventh and eighth factors, we say no more than that we regard them as saying essentially what we have said above in our "never say never" paragraph.*

48. The Court of appeal earlier in the Judgment noted:

80. *There is no reason in principle why someone who is a shareholder and director of a company cannot also be an employee of the company under a contract of employment. There is also no reason in principle why someone whose shareholding in the company gives him control of it – even total control (as in Lee's case) – cannot be an employee. In short, a person whose economic interest in a company and its business means that he is in practice properly to be regarded as their "owner" can also be an employee of the company. It will, in particular, be no answer to his claim to be such an employee to argue that: (i) the extent of his control of the company means that the control condition of a contract of employment cannot be satisfied; or (ii) that the practical control he has over his own destiny – including that he cannot be dismissed from his employment except with his consent – has the effect in law that he cannot be an employee at all. Point (i) is answered by Lee's case, which decided that the relevant control is in the company; point (ii) is answered by this court's rejection in Bottrill of the reasoning in Buchan.*

81. Whether or not such a shareholder/director is an employee of the company is a question of fact for the court or tribunal before which such issue arises. In any such case there may in theory be two such issues, although in practice the evidence relevant to their resolution will be likely to overlap. The first, and logically preliminary one, will be whether the putative contract is a genuine contract or a sham. The second will be whether, assuming it is a genuine contract, it amounts to a contract of employment (it might, for example, instead amount to a contract for services). We make clear that we are not of course suggesting that cases raising the first issue are likely to be common, and we think it probable that they will be relatively exceptional. Despite the repeated references in the authorities to the theoretical possibility of a contract being a sham, no such case has been discovered in the principal authorities to which we have been referred. We make no attempt to give any prescriptive guidance as to the resolution of such issues, but we at least offer the following general observations.

82. In cases involving an alleged sham, there will, as we have said, almost invariably be what purports to be a formal written employment contract, or at least a board minute or a memorandum purporting to record or evidence the creation of such a contract. The task of the court or tribunal will be to decide whether any such document amounts to a sham in the sense of the Snook guidance (and see also Protectacoat, to which we referred in paragraph [37]). Any such inquiry will usually require not just an investigation into the circumstances of the creation of the document but also into the parties' purported conduct under it, which will be likely to shed light on the genuineness or otherwise of the claimed contract. The fact that the putative employee has control over the company and the board, and so was instrumental in the creation of the very contract that he is asserting, will obviously be a relevant matter in the court's consideration of whether the contract is or is not a sham. It will usually be the feature that prompted the inquiry in the first place.

83. An inquiry into what the parties have done under the purported contract may show a variety of things: (i) that they did not act in accordance with the purported contract at all, which would support the conclusion that it was a sham; or (ii) that they did act in accordance with it, which will support the opposite conclusion; or (iii) that although they acted in a way consistent with a genuine service contract arrangement, what they have done suggests the making of a variation of the terms of the original purported contract; or (iv) that there came a point when the parties ceased to conduct themselves in a way consistent with the purported contract or any variation of it, which may invite the conclusion that, although the contract was originally a genuine one, it has been impliedly discharged. There may obviously also be different outcomes of any investigation into how the parties have conducted themselves under the purported contract. It will be a question of fact as to what conclusions are to be drawn from such investigation.

85. In deciding whether a valid contract of employment was in existence, consideration will have to be given to the requisite conditions for the creation of such a contract and the court or tribunal will want to be satisfied that the contract meets them. In Lee's case the position was

ostensibly clear on the documents, with the only contentious issue being in relation to the control condition of a contract of employment. In some cases there will be a formal service agreement. Failing that, there may be a minute of a board meeting or a memorandum dealing with the matter. But in many cases involving small companies, with their control being in the hands of perhaps just one or two director/shareholders, the handling of such matters may have been dealt with informally and it may be a difficult question as to whether or not the correct inference from the facts is that the putative employee was, as claimed, truly an employee. In particular, a director of a company is the holder of an office and will not, merely by virtue of such office, be an employee: the putative employee will have to prove more than his appointment as a director. It will be relevant to consider how he has been paid. Has he been paid a salary, which points towards employment? Or merely by way of director's fees, which points away from it? In considering what the putative employee was actually doing, it will also be relevant to consider whether he was acting merely in his capacity as a director of the company; or whether he was acting as an employee.

86. *We have referred in the previous paragraph to matters which will typically be directly relevant to the inquiry whether or not (there being no question of a sham) the claimed contract amounts to a contract of employment. What we have not included as a relevant consideration for the purposes of that inquiry is the fact that the putative employee's shareholding in the company gave him control of the company, even total control. The fact of his control will obviously form a part of the backdrop against which the assessment will be made of what has been done under the putative written or oral employment contract that is being asserted. But it will not ordinarily be of any special relevance in deciding whether or not he has a valid such contract. Nor will the fact that he will have share capital invested in the company; or that he may have made loans to it; or that he has personally guaranteed its obligations; or that his personal investment in the company will stand to prosper in line with the company's prosperity; or that he has done any of the other things that the "owner" of a business will commonly do on its behalf. These considerations are usual features of the sort of companies giving rise to the type of issue with which these appeals are concerned but they will ordinarily be irrelevant to whether or not a valid contract of employment has been created and so they can and should be ignored. They show an "owner" acting qua "owner", which is inevitable in such a company. However, they do not show that the "owner" cannot also be an employee.*

87. *We have, however, twice -- and deliberately -- used the word "ordinarily" in the last paragraph. We have used the word not because we foresee other circumstances but because "never say never" is a wise judicial maxim.*

49. The Secretary of State accepts in their ET3 that following Neufeld the decision of whether or not a shareholder/ director is an employee is a question of fact and that those are the principles to apply.

50. The Employment Appeal tribunal in **Secretary of State for Business, Innovation and Skills v Knight [2014] IRLR 605, EAT** rejected the

contention that because an employee had forfeited a salary for periods of time that meant that her status had changed from being an employee.

51. I have also been taken to and considered two more recent authorities namely **Dugdale v DDE Law Limited UKEAT/0168/16/LA** where the Employment appeal Tribunal considered an Employment Judge who applied the guidance in Neufeld had not erred in law and **Rainford v Dorset Aquatics Ltd UKEADT/ 0226/20/BA** where it was held:

Although there was no reason in principle why a director/shareholder of a company could not also be an employee or worker, it did not necessarily follow that simply because he did work for the company and received money from it he had to be one of the three categories of individual identified in s 230(3) of the Act. Overall, the tribunal's conclusion that the appellant was not an employee or worker was one of fact based on relevant factors and was not perverse.

52. The Employment Appeal Tribunal in **Rajah v Secretary of State EAT 125/95** held that the relevant date for the purpose of deciding whether the Secretary of State is liable to make payments from the National Insurance fund to an employee is the date of insolvency, not as it was previously.

Claim for outstanding holiday pay

53. The Working Time Regulations 1998 set out a statutory minimum period of holiday, and in the event that holiday is not taken in the leave year when an employment ends, for payments to be made in lieu. Regulation 13 and 13A provides for a statutory minimum of 5.6 weeks per annum. The starting date is the date the employment commenced unless there is a written relevant agreement between the employee and the employer provides for a different leave year.

54. In the event that the sums are outstanding the employee may bring a claim for breach of contract or pursuant to regulation 14 of the Working Time Regulations. A worker is entitled to be paid a week's pay for each week of leave. A week's pay is calculated in accordance with the provisions of sections 221-224 Employment Rights Act 1996, with some modifications in calculating a weeks' pay an average of pay over the previous 52 weeks is taken.

55. The Working Time (Coronavirus) (Amendment) Regulations 2020 amended Regulation 13 of the Working Time Regulations 1998 in the following manner:

In regulation 13—
(a)at the beginning of paragraph (9)(a) insert "subject to the exception in paragraphs (10) and (11),";
(b)after paragraph (9) insert—
"(10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).

(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.
(12) An employer may only require a worker not to take leave to which paragraph (10) applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so.
(13) For the purpose of this regulation "coronavirus" means severe acute respiratory syndrome corona-virus 2 (SARS-CoV-2)."

Conclusions

56. I turn to my conclusions having regard to the findings which I have made, the issues and the law.

Was the Claimant an employee?

57. It seems to me the starting point is to take a step back and consider the factors which point to the Claimant being an employee and those that point against him being an employee.

58. There are various factors which would point against the suggestion the Claimant is an employee:

    a. There was no written contract, which is not a bar.
    b. There are some periods where salary is not received as is due and is therefore some informality.
    c. The salary was less than the minimum wage.
    d. There is informality on holiday and what was taken.
    e. Whilst the secretary of state submits that there is not sufficient control given that the Claimant is the director, I must have in mind what the Court of Appeal state in that respect as per Neufeld at paragraph 80 and Clark at 98(2).

59. The factors that indicate that he was an employee are:
    a. I have found that he worked for a fixed 40 hours per week.
    b. He was paid a regular salary of £1,002 net, and there is no evidence that he topped that salary up with dividends or otherwise.
    c. There was a clear distinction in his treatment of company money and payments to him as an employee.
    d. There was a clear distinction in the Claimant's view of his role as an employee and his role as a director, in his words the *two hats* he wore and that evidence was persuasive.
    e. There is no evidence that he could substitute another in his role of an employee. The issue on him being substituted on a job with another employee is distinct to being substituted as an employee.
    f. When larger sums were paid to the company there is no evidence he sought to take that money out, he maintained the consistency of his salary.
    g. He and the company paid in to an employee pension scheme for his benefit.
    h. The payslips, P60 and tax paid all are indicative of his status as an employee.
    i. The company was registered for VAT not him as an individual, and the work was done on the company's behalf not on his own.

j. There is no evidence he worked elsewhere, when the business was struggling his wife stepped down from her employment and sought alternate employment.

60. I must then in conjunction with my findings and conclusions consider the eight points as identified by the Court of Appeal in Clark, as summarised and modified in Neufeld:

(1) Where there is a contract ostensibly in place, the onus is on the party seeking to deny its effect to satisfy the court that it is not what it appears to be. This is particularly so where the individual has paid tax and national insurance as an employee; he has on the face of it earned the right to take advantage of the benefits which employees may derive from such payments.

61. There is no contract in place. In accordance with paragraph 88 of Neufeld I am satisfied that the burden is on the Claimant to prove there is such a contract. No contract being in place was typical of the business from my finding in respect of Mr Fazal's wife being employed and there was no contract. He has made payments for National Insurance and tax as an employee and the employer paid its National Insurance contribution.

*(2) The mere fact that the individual has a controlling shareholding does not of itself prevent a contract of employment arising. Nor does the fact that he in practice is able to exercise real or sole control over what the company does (**Lee**).*

*(3) Similarly, the fact that he is an entrepreneur, or has built the company up, or will profit from its success, will not be factors militating against a finding that there is a contract in place. Indeed, any controlling shareholder will inevitably benefit from the company's success, as will many employees with share option schemes (**Arascene**)*

62. Whilst the Secretary of State points to the principles in the second and third factors as being factors against Mr Fazal being an employee, they do not prevent a contract being in place. He was a 50% shareholder for the majority of the company's existence and this increased to 100% in the latter months. Nor does the fact that he is an entrepreneur or attempting to build the company indicate more strongly that he is not an employee.

(4) If the conduct of the parties is in accordance with the contract that would be a strong pointer towards the contract being valid and binding. For example, this would be so if the individual works the hours stipulated or does not take more than the stipulated holidays.

(5) Conversely, if the conduct of the parties is either inconsistent with the contract (in the sense described in para.96) or in certain key areas where one might expect it to be governed by the contract is in fact not so governed, that would be a factor, and potentially a very important one, militating against a finding that the controlling shareholder is in reality an employee.

63. In considering the conduct of the parties the factors which I have outlined above as to what indicates he is and is not an employee are relevant. I am

satisfied on balance that the conduct is such that it indicates there is an employee and employer relationship and that the conduct is indicative of such a relationship. The factors outlined at paragraph 59 of my conclusions detail the conduct that points towards the contract being valid, in particular the fact that National Insurance and Tax was paid through the PAYE scheme and National Insurance paid both as an employer and an employee, that I have found there was a consistent salary paid for a fixed period of hours and the treatment of company money as just that.

64. Balanced against those factors which indicate conduct in accordance with an employment status are those I have outlined that are against it at paragraph 58. I have considered and weighed in those factors, in particular the fact that the national minimum wage was not paid. Whilst that would point away from employment, it is not in my judgment determinative. There are of course employers who do not pay it, and there are consequences for doing so. However, when I look at why he was not paid the appropriate rate I accept his evidence that he followed the accountant's advice on the rate of salary and his focus was on doing work. I am however, satisfied that he worked 40 hours and was paid a salary. The fact the hours were not set at fixed times does not change my conclusions.

65. Again, whilst the Claimant has not taken his full entitlement, he has not sought to take more holiday. His reasons for doing so were to build up the business and complete the work. That does not, in my judgment, prohibit him from being an employee.

66. However, overall when I weigh in all the factors and the circumstances of this case in accordance with my findings I am satisfied the conduct of both employee and employer is consistent with the contract and there being a contract of employment.

*(6) In that context, the assertion that there is a genuine contract will be undermined if the terms have not been identified or reduced into writing (**Fleming**). This will be powerful evidence that the contract was not really intended to regulate the relationship in any way.*

67. This paragraph was subject to further comment by the Court of Appeal in **Neufeld** at paragraph 89. Mr Soni on behalf of the secretary of state places emphasis on this factor, it is in my Judgment just one factor which I must take account of an in my judgment the other factors, in respect of how the Claimant and the employer behaved indicate that he was he was an employee.

(7) The fact that the individual takes loans from the company or guarantees its debts could exceptionally have some relevance in analysing the true nature of the relationship, but in most cases such factors are unlikely to carry any weight. There is nothing intrinsically inconsistent in a person who is an employee doing these things. Indeed, in many small companies it will be necessary for the controlling shareholder personally to have to give bank guarantees precisely because the company assets are small and no funding will be forthcoming without

*them. It would wholly undermine the **Lee** approach if this were to be sufficient to deny the controlling shareholder the right to enter into a contract of employment.*

68. There is no evidence of loans or guarantees within this case and this factor does not alter my conclusions.

*(8) Although the courts have said that the fact of there being a controlling shareholding is always relevant and may be decisive, that does not mean that the fact alone will ever justify a Tribunal in finding that there was no contract in place. That would be to apply the **Buchan** test which has been decisively rejected. The fact that there is a controlling shareholding is what may raise doubts as to whether that individual is truly an employee, but of itself that fact alone does not resolve those doubts one way or another.*

69. The fact that Claimant was a controlling shareholder is relevant but is not in this case decisive for the other factors I have outlined.

70. In considering the points raised within **Ready Mix Concrete,** I agree that it is for the Claimant to prove existence in terms of contract. I am satisfied in place and there is obligation of mutuality on the Claimant to accept that work for the company to provide. He told me and I have found that he worked the 40 hours per week, to do the work for the company. In return he receives his salary. When I look at the control test there is an element of overlap in the context of the Claimant being director as well as an employee however, that is not determinative or conclusive when I look at the Court of Appeal analysis in **Neufeld** and **Clark**. When I look at all the factors indicating the Claimant was an employee and those indicating he was not, as I have already set out within these conclusions, when I weigh all them all I am satisfied that the provisions overall are consistent with there being a contract of service.

71. Therefore, I am satisfied on the balance of probabilities, that the Claimant was an employee. The fact he has not enforced his rights does not mean that he is not an employee.

Calculation

72. When I look at the calculation for a redundancy payment I must calculate the same in accordance with the provisions as set out within the Employment Rights Act. The issue in this respect is whether or not the weekly wage of the Claimant should be at the minimum wage, despite the fact he was not paid it.

73. I am satisfied the position as submitted by Mr Kenward is correct. The decision in **Paggetti** is clear. For the purpose of calculating a week's pay even if a Claimant was not paid the minimum wage that is the figure to be used.

74. Therefore, given my conclusion is that the weekly wage must include the minimum wage there is no challenge weekly wage is therefore £356.40.

75. The Claimant was 48 years old at the time of his dismissal, he was employed for 3 full years and his weekly wage was £356.40. His redundancy payment is therefore £1,603.80 as claimed.

Other Payments
Holiday

76. I accept and have found that holiday was carried over from the previous holiday year in the amount of 15 days. I have found it was not practicable in accordance with the Working Time Regulations 2020 for the Claimant to have taken the leave within the previous holiday year. That was due to the effects of coronavirus and because of the impact it had on his business requiring him to work more. That is why it was not taken.

77. It is submitted on behalf of the Secretary of State that the Clamant was not a key worker. That is correct and there is no suggestion he was. However, there is no requirement in the regulations which I have read, or had pointed out that key worker status is required for someone to carry over leave. I simply must be satisfied it was no reasonably practicable due to the impact of coronavirus and I am satisfied that is the case.

78. It has not been contested that there is 1.3 days leave accrued within the most recent leave year.

79. The gross pay for 16.3 days at the weekly wage is £1,161.84. For the reasons set out above I am satisfied that this should be calculated on the basis of the national minimum wage, to do otherwise in my judgement would be go contrary to **Paggetti.**

Notice

80. It is not contested that the statutory notice period which would apply is three weeks. Again, given the decision in **Paggetti** I am satisfied that the notice pay should be calculated on the basis of the national minimum wage. 3 weeks at £356.40 provides that the Claimant would be entitled to £356.40. That provides a total of £1,069.20.

Arrears of pay

81. In terms of arrears of pay I am satisfied from both the oral and written evidence that there are arrears of pay which are owing, by the failure to pay the national minimum wage. I am satisfied that any award must be based on the National Minimum Wage given the legislation. I accept the detailed breakdown as to the sums outstanding due to a failure to pay the National Minimum Wage in accordance with his schedule at 133, and his Schedule of Loss.

82. I accept and adopt the revised calculations put forward by Mr Kenward who has applied the recent and previous national minimum wages. For the period up to April 2020 that provides arrears of pay of £1,577.42 and after April 2022 it amounts to £1,295.54.

Time

83. However, where the Claimant fails on his claims for payments for debts for holiday, notice and arrears of pay is in respect of time. In accordance with section 188, the time for the Claimant to present a complaint to the

Tribunal is within 3 months of the rejection by the Secretary of State. That rejection occurred on 2nd November 2021. The claim was issued 11th February 2022. Even taking account any ACAS extension the time for bringing the claim for those debts was 2nd February 2022. There is no evidence, and the burden is on the Claimant, as to whether it was reasonably practicable for him to bring claim in the relevant period and therefore in my judgment those claims are out of time.

84. As I indicated before giving my oral reasons, I will give the Claimant the opportunity to address that position, if so advised, in and provide the Secretary of State an opportunity to respond, if so advised on any points which are raised. I do so pursuant to Rules 29 and 41 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, that also being a procedure the parties agreed. For the avoidance of doubt this provision is in addition to any application for reconsideration under the rules and does not impact the parties ability to make any request.

Employment Judge Lang

15th January 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON
25 January 2023 By Mr J McCormick

FOR THE TRIBUNAL OFFICE